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Sit-in Conduct Held Constitutionally Protected

will be invalidated under the equal protection clause remains to be seen. In any event, it would appear that future attempts by the states to exercise their power over voting qualifications will be carefully scrutinized and possibly severely limited by that uncertainty which often accompanies such a broad interpretation.

Sit-in Conduct Held Constitutionally Protected

The five Negro petitioners had entered a small regional library[1] in Louisiana with the intention of staging a sit-in. Petitioner Brown requested a particular book. The librarian, after a search, informed the petitioner that the library did not contain the book desired, but that she would arrange to obtain it for him from the state library. After this service had been rendered, the five petitioners were requested to vacate the library by the librarian, her supervisor, and finally by the sheriff. When petitioners refused to leave they were arrested and later convicted of violating Louisiana's "breach of peace" statute.[2] The United States Supreme Court, in a five to four decision, reversed the conviction and *held* that petitioners' conduct was constitutionally protected under the first and fourteenth amendments. *Brown v. Louisiana,* 383 U.S. 131 (1966).

In 1865 slavery was ended in this country by the ratification of the thirteenth amendment. Subsequently, the fourteenth amendment granted to all Americans equal protection of the laws, the privileges and immunities of citizens, and guaranteed that no state would deprive any person of his life, liberty or property without due process of law.[3] In addition, the fifteenth amendment guaranteed all citizens the right to vote without regard to race or color.[4] These amendments, followed by potentially powerful civil rights legislation,[5] apparently gave the Negro a massive array of federally protected rights. These rights, however, were soon limited by decisions of the United States Supreme Court.

In 1872, in the *Slaughter-House Cases,*[6] the fourteenth amendment was interpreted as protecting from state action only the "privileges and immunities" conferred upon one as a citizen of the United States.[7] Thus, those rights which derived from state citizenship were deemed not protected from state action by the fourteenth

[1] The library in question was a local service facility without any reading room. The room where the events took place was quite small, containing two tables and one chair (excluding those used by the librarians), a stove, a card catalogue, and open bookshelves. Brown v. Louisiana, 383 U.S. 131, 135 (1966).

[2] LA. REV. STAT. ANN. § 14:103.1 (Supp. 1965).

[3] U.S. CONST. amend. XIV.

[4] U.S. CONST. amend. XV.

[5] *E.g.,* 14 Stat. 27 (1866), 42 U.S.C. § 1982 (1964); 16 Stat. 144 (1870), 42 U.S.C. § 1981 (1964); 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1964).

[6] 83 U.S. 36 (1872).

[7] See *id.* at 78-80.

amendment.[8] As a result, the doctrine of "dual citizenship," which distinguishes between federal and state citizenship, was explicitly formulated.

The Supreme Court utilized this doctrine in *The Civil Rights Cases*.[9] There, the Court struck down as unconstitutional the Civil Rights Act of 1875[10] which provided:

> That all persons within the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters and other places of public amusement . . . .

The Court made it clear that the fourteenth amendment does not invest Congress with the power to legislate upon subjects which are the particular concern of state legislatures. It does not authorize Congress to create a code of municipal law for the regulation of private rights, but authority is given to preclude the operation of state law and conduct of state officers where they infringe upon fundamental rights. Consequently, the limits of state action were strictly drawn so that the amendment's applicability to the civil rights area was limited.

A further limitation was placed on the effectiveness of the fourteenth amendment in *Plessy v. Ferguson*.[11] In this case, the Court established the "separate but equal" doctrine, which provides that the utilization of distinct but comparable facilities for Negroes does not violate rights guaranteed by the fourteenth amendment.[12] The Court emphasized that since the rights derived from state citizenship were more clearly delineated, those rights derived from *federal* citizenship could not be relied upon to overcome legitimate state use of the "separate but equal" doctrine.

The apparent finality of this doctrine had a dampening effect on the expansion of civil rights in the area of racial segregation.[13] However, the 1930's brought about a renewal of interest and concern in this area, due in part to the great social upheaval of the times.[14] The decisions handed down by the Supreme Court during this period tended to discourage racial discrimination while protecting the rights of the Negro in numerous areas, including criminal prosecution,[15] education,[16] voting rights,[17] housing,[18] and railroad dining.[19] Nevertheless, while some inroads had been made, the "separate but equal" doctrine remained the major obstacle to further progress in the area of civil rights.

In 1954, in *Brown v. Board of Educ.*,[20] the Court overruled the "separate but

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[8] *Id.* at 74.
[9] 109 U.S. 3, 11 (1883).
[10] 18 Stat. 336 (1875).
[11] 163 U.S. 537 (1896).
[12] *Id.* at 543-44.
[13] *But see* Guin v. United States, 238 U.S. 347 (1915); Warley v. Buchanan, 245 U.S. 60 (1917).
[14] This renewal was also brought about by the change in procedural rules of the United States Supreme Court. Under the statute presently contained in 28 U.S.C. § 1257(3) (1964), the Court was permitted to review cases by certiorari rather than solely by appeal, thus giving it greater latitude in the selection of cases for review.
[15] Norris v. Alabama, 294 U.S. 587 (1935).
[16] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
[17] Smith v. Allwright, 231 U.S. 649 (1944).
[18] Shelley v. Kraemer, 339 U.S. 1 (1948).
[19] Henderson v. United States, 339 U.S. 816 (1950).
[20] 347 U.S. 483 (1954).

equal" doctrine and held that separate educational facilities were a deprivation of the equal protection guarantee of the fourteenth amendment.[21] Although this decision was the death blow to the "separate but equal" doctrine, in reality, it had little practical effect on racial discrimination. Only in the past six years, with the increased use of "sit-in" demonstrations and the consequent cases, has the impact of *Brown v. Board of Educ.* been felt by the states.[22]

There have been numerous arrests and convictions of "sit-in" demonstrators, frequently for violation of state trespass laws or breach of peace statutes.[23] In Louisiana, in particular, there have been three convictions for violations of its breach of peace statute, all of which have been reversed by the United States Supreme Court. In the first of these cases, *Garner v. Louisiana,*[24] decided in 1961, the Supreme Court reversed the convictions of the Negro petitioners who allegedly violated Louisiana's breach of peace statute.[25] In *Garner* the petitioners sat at "white" lunch counters and refused to obey an order to leave. They were arrested because their conduct was held to be such as would "unreasonably and foreseeably disturb the public."[26] The Court found that this section of the statute, as previously construed by Louisiana courts, encompassed conduct which is either violent or boisterous in itself, or which is so provocative in nature as to induce a foreseeable physical disturbance. It was pointed out that the statute, in and of itself, did not reach peaceful and orderly conduct, such as that of the petitioners.[27] Furthermore, the Court noted that the Louisiana legislature, shortly after petitioners' protest, had amended the statute in question, in order to reach peaceful "sit-in" demonstrations.[28] The negative inference that it did not previously encompass this situation substantiated the Court's interpretation of the statute.

Again, in *Taylor v. Louisiana,*[29] six Negroes had been arrested and convicted of violating Louisiana's amended breach of peace statute since they failed to leave a "white only" waiting room in a bus depot when ordered to by the local chief of police. The Court, relying on *Garner,* reversed the conviction stating that:

> the only evidence to support the charge was that petitioners were violating a custom that segregated people in waiting rooms according to their race, a practice not allowed in interstate transportation facilities by reason of federal law.[30]

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[21] *Id.* at 495.

[22] For development of the "sit-in" movement, see generally Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days,* 1960 DUKE L.J. 315, 317 (1960).

[23] *Id.* at 350-51, 343-44.

[24] 368 U.S. 157 (1961).

[25] "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public: . . . 7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public." LA. REV. STAT. ANN. § 14:103(7) (1942).

[26] Garner v. Louisiana, 368 U.S. 157, 158 (1961).

[27] *Id.* at 167.

[28] "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: refuses to leave the premises of another when requested to do so by any owner, lessee, or any employee thereof, shall be guilty of disturbing the peace." LA. REV. STAT. ANN. § 14:103.1(A)(4) (Supp. 1965).

[29] 370 U.S. 154 (1962).

[30] Taylor v. Louisiana, 370 U.S. 154, 156 (1962).

Both *Garner* and *Taylor* stand for the proposition that the United States Supreme Court will not uphold convictions based on statutes designed to outlaw peaceful protests in or upon a segregated facility, be it private or public, wherein the defendants were either denied service or asked to leave solely because of their color. This proposition was further developed in *Cox v. Louisiana*[31] which involved a conviction of a civil rights leader under the same Louisiana breach of peace statute. He had led a crowd into a predominantly white business district whereupon he actively urged the crowd to sit-in at "white only" lunch counters until they were served. The Supreme Court reversed the conviction and held that petitioner's conduct in addressing the demonstrators in a peaceful manner was constitutionally protected by first amendment guarantees of free speech and assembly.[32] Thus, the Court progressed from the *Garner* and *Taylor* rationales, viz., mere statutory interpretations, and chose to base its reversal on broader constitutional grounds.

The object of the demonstration in the instant case was to protest the discriminatory practices of the Louisiana library system which maintained two separate bookmobiles, one for whites and the other for Negroes. Ironically, however, the library at which petitioners staged their protest, at least on this occasion, did not practice discrimination. Instead, the librarian was cooperative and attempted to obtain the book requested. Because of their persistence in remaining in the library after numerous requests to leave, the petitioners were arrested and convicted of violating the Louisiana breach of peace statute. Mr. Justice Fortas, writing for the Court, declared that the petitioners' conduct was even less disruptive than that involved in any of the preceding three situations in which the Court invalidated convictions under the same Louisiana statute or its predecessor. The first case, *Garner,* was utilized to show the validity of a "peaceful and orderly protest demonstration, with no intent to provoke a breach of the peace. . . ."[33] *Taylor* and *Cox* were compared to the fact situation of the instant case to refute the contention that a breach of the peace might be "occasioned" by the petitioners' sit-in. It was stated that:

> [S]urely there was less danger that a breach of the peace might occur from Mrs. Katie Reeves and Mrs. Perkin in the . . . library than that disorder might result from the restless white people in the bus depot waiting room in *Taylor,* or the 100 to 300 'grumbling' white onlookers in *Cox.*[34]

Mr. Justice Brennan, in a concurring opinion, pointed out that petitioners' right to protest was constitutionally protected and could not be interfered with by the state. His interpretation of *Cox* was that it made the statute in the instant case unconstitutional on its face.[35] Mr. Justice White, in his concurring opinion, stated that it was difficult to avoid the conclusion that the petitioners were asked to leave the library because they were Negroes. Assuming this conclusion to be true, he

[31] 379 U.S. 536 (1965).

[32] Cox v. Louisiana, 379 U.S. 536, 545, 552 (1965).

[33] Brown v. Louisiana, 383 U.S. 131, 140 (1966).

[34] *Id.* at 140.

[35] *Id.* at 143-50.

urged reversal of the convictions on the ground that petitioners were denied the "equal protection of the laws" guaranteed to them by the fourteenth amendment.[36]

Mr. Justice Black, with Justices Clark, Harlan and Stewart concurring, wrote the dissenting opinion, in which he contended that the majority had erroneously relied upon the Court's prior decisions in its desire to protect civil rights demonstrators. In support of his contention, Mr. Justice Black pointed out the following: (1) the convictions in *Garner* were obtained under a different statute than confronted the Court in the instant case; (2) there was no indication whatsoever in *Taylor* that the petitioners therein had a constitutional right to remain in the bus depot, if they had no business there and had been requested to leave by the proper authorities; and, (3) there was an erroneous interpretation of *Cox* in both the majority opinion and Mr. Justice Brennan's concurring opinion, in that the Court in *Cox* held unconstitutional only that part of the statute that was properly before it. This part related only to public streets, sidewalks, and ways, and not to public buildings as were involved in the instant case. He further maintained that the alleged discriminatory practices in Louisiana should have no bearing on the instant case since no discrimination was practiced upon the petitioners. Therefore, he argued, the convictions of the defendants were sustainable and the Court should not substitute its own judgment for that of the state court. In conclusion, the dissenting opinion emphasized that the full impact on public order of the holding of the majority would not be felt until similar demonstrators staged a "sit-in" in a large library's reading room, in a school or a courthouse.[37]

In evaluating the significance of the instant case, it must be constantly recognized that the courts should protect civil rights demonstrators only so long as their activity does not infringe upon the basic freedoms of others not involved in the protest. While it may seem that the basic freedoms of the members of the general public are not inhibited by permitting a small disturbance in this Louisiana branch library, the holding of the instant case throws into doubt the right of the person in charge of an establishment to maintain order therein. The members of the public do have a right, though perhaps it would be difficult for anyone to legally enforce it, to have order maintained in the public institutions and establishments which are necessary to modern life. Therefore, those in charge of such establishments must be allowed the flexibility of control necessary to maintain order.

Mr. Justice Black's warning against the severe potential effects on the public order of the Court's decision has some validity since it points up the fact that the Court has balanced the potential effect of the petitioners' activity on the public order against the worthiness of their cause and perhaps the general unworthiness of the motives of the State of Louisiana. Where the conduct of sit-in demonstrators threatened and/or caused great inconvenience to a considerable number of people, as in Mr. Justice

[36] *Id.* at 151.

[37] *Id.* at 151-68.

Black's examples, the Court would probably uphold these convictions under a similar statute. But, within the rationale of the instant case there is authority for the proposition that a peaceful demonstration by any person for a cause he believes just, whether erroneously or not, cannot be halted by the person duly charged with authority to maintain order in the place of the demonstration. For example, a group of teenagers who believe that the supervisor of a library is practicing unfair discrimination against them because they are permitted to use only certain rooms in the library could now stage a "sit-in" and disrupt the operation of the library. Under the rationale of the instant case, it could be strongly argued that they could not be required to leave or be arrested pursuant to a breach-of-peace type statute, since their conduct in protesting this discrimination is constitutionally protected. Therefore, the Court in its desire to protect the Negro may have opened the doors of all establishments to anyone who believes he has a valid cause. It, at least, has made likely further inroads by demonstrators on the public order, as they will probe for the point at which the Court will refuse constitutional protection to disruptive demonstrations.

In conclusion, it is submitted that the distinctions made by the dissent between the instant case and the precedents relied upon are valid. First, in *Garner,* the petitioners were actually discriminated against at the time of demonstration, whereas in the instant case, no such discrimination had as yet occurred. Second, the rationale of *Taylor* is inapplicable, since here no discrimination was practiced at the locality of the demonstration. And finally, the standards imposed upon a state in measuring disturbances upon the street, the situation in *Cox,* cannot be the same for measuring disturbances in public buildings. Thus, it appears that the Court, in trying to promote and aid Negro equality, has established a potential base from which the vague but real right of the general public to order may be assaulted by demonstrators in ways not necessary to the preservation of constitutionally protected civil rights.

CHILD BENEFITS

(Continued)

former Commissioner Keppel's twin objectives. As he phrased them, they are:

> First, to raise the quality of education in our schools everywhere and for everyone. In the 20th century, we cannot tolerate second-class education if we intend to remain a first-class nation.
>
> Second, to bring equality of educational opportunity to every child in America whatever his color, or creed, or handicap, or family circumstance.[43]

[43] Address by former United States Commissioner of Education Francis Keppel before the Council of Chief State School Officers in Honolulu, Hawaii, November 10, 1965.

GOVERNMENT BIRTH CONTROL

(Continued)

opinions of the Supreme Court justices in *Griswold*! The opinion of the Court, written by Mr. Justice Douglas,[27] ranged over the greatest variety of sources in the decided cases for its inspirations and concepts—cases involving private schools,[28] freedom of reading,[29] freedom to teach,[30] freedom of association,[31] search and seizure,[32] and self-incrimination.[33]

At a lawyers' meeting at Washington, last February, I heard the right of privacy in government birth control programs derided as having "no foundation in the law reviews." Neither did many of our now recognized civil rights a half century ago. New developments require new legal thinking. The right of privacy in relation to government birth control has been little considered due to fears over population growth and (upon the part of some Catholics) due to fears that the Church be seeming to impose its particular views respecting the morality of contraception upon the whole of a religiously plural society at the dawn of an age of ecumenism and a time of a new awareness of the Secular City. I see no inconsistency between the spirit of one who wholeheartedly greets this dawn and of the lawyer whose task remains the law. I stress this because technological and social forces of our time mount threats to human privacy which law alone will suffice to counter. If we are to have government birth control in any stabile form in the future, now is the time to be civilizing it and lawyers must be the conscience of the movement to do so.

[27] Griswold v. Connecticut, 381 U.S. 479, 481-84 (1965).
[28] Pierce v. Society of Sisters, 268 U.S. 510 (1925).
[29] Martin v. Struthers, 319 U.S. 141 (1942).
[30] Wieman v. Updegraff, 344 U.S. 183 (1952).
[31] NAACP v. Alabama, 357 U.S. 449 (1958).
[32] Mapp v. Ohio, 367 U.S. 643 (1961).
[33] Boyd v. United States, 116 U.S. 616 (1886).

IN OTHER PUBLICATIONS

(Continued)

of legal institutions, for correctness of procedures in institutional processes is the correlative of rightness of quality in individual living. Institutional procedures are adjudged correct from the standpoint of the universal principles of natural law to the extent to which they keep alive the purposive side of man's nature and maintain communication. Beyond this universal judgment, the propriety and impropriety of the detailed content of the life of institutions and individuals depend on factors other than the substantive natural law and relate to man in his essence. Because Fuller considers the detailed content of the life of an institution and an individual to be not properly a matter for absolutistic moral judgments (so long as the universal principles that

constitute the most basic dimension of substantive natural law are not violated) and because Fuller emphasizes the procedural aspects of legal and other institutions, it might look as if he is a moral relativist, as if he fails to attend to the question of right ends, and as if his natural law is merely technological. But the fact is that Fuller's emphasis on proper procedures rests on, is derived from, and is justified by his postulated understanding of the nature of man which provides a process view of the "end" of man and a universal basis for moral judgments.